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SUPREME COURT, U.S.

No. 81-2169

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

GILBERT A. HARING, et al., Petitioners;

v.

JOHN FRANKLIN PROSISE, Respondent.

MOTION FOR LEAVE TO FILE
SUPPLEMENTAL BRIEF AFTER ARGUMENT

COMES NOW the respondent, by counsel, and moves this Honorable Court for leave to file the attached Supplemental Brief pursuant to Rule 35.6 of the Rules of the Supreme Court. As grounds for this motion, respondent states:

1. In a footnote to the reply brief in support of their petition for a writ of certiorari, petitioners for the first time brought to respondent and the Court's attention the case of Souders v. Gabrielson, et al., Record No. 741124 (Va.Sup.Ct. April 16, 1975), in which the Virginia Supreme Court had denied a writ of error to a judgment of the Arlington County, Virginia, Circuit Court (Reply Brief To Opposition To Petition For Writ Of Certiorari at 6 n. 5).

2. In their brief on the merits, petitioners again called attention to the Souders case in a footnote (Petitioners' Brief at 20 n.10). However, having no reason to believe that the

Souders court did not hold as petitioners related that it had,[1/] and not believing the holding to be on point or controlling authority even if it were on point, respondent chose not to comment upon Souders in his brief on the merits.

3. In their reply brief on the merits, though, petitioners for the first time pointed to the denial of a writ of error in Souders as "precedent" (see, e.g., Reply Brief at 4,5,6), for the proposition that "Virginia law precludes a civil suit based on §1983 after it is demonstrated that the plaintiff had previously pleaded guilty to the crime that gave rise to the alleged violation of his civil rights" (Reply Brief at 7). Still not believing Souders to be on point or controlling, respondent spent the limited time before oral argument after receipt of the reply brief determining the precedential effect of a denial of writ of error in Virginia rather than to going to the Arlington County Circuit Court to examine the record in the Souders case.

4. However, in oral argument several members of the Court expressed an interest in the precise holding of the Souders court. As a result, at the first opportunity after oral argument, respondent reviewed the record in Souders and discovered that the court actually precluded that §1983 action for a reason very different from the reason offered by petitioners.

5. Specifically, as noted above, petitioners cited Souders as "precedent" for the argument that in Virginia a §1983 action is precluded once it is "demonstrated that the plaintiff had previously pleaded guilty to the crime that gave rise to the alleged violation of his civil rights" (Reply Brief at 7). On the contrary, though, as a cursory examination of the Appendix to the attached Supplemental Brief reveals, the Souders court

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1/ For example, respondent noted that counsel for the police defendants in Souders now is counsel for petitioners in this case (Appendix at 4a).

precluded litigating that §1983 suit only after taking evidence and argument on the question "whether all of the issues which are presented in the [§1983] pleadings were, indeed, decided in th[e] lower Courts" (Appendix at 5a)(emphasis added).

6. As a result, rather than supporting petitioners' position, Souders supports respondent's position that collateral estoppel extends only to issues which were actually decided in the former suit. Either intentionally or unintentionally, petitioners have misstated the holding in Souders in order to support a proposition for which it does not stand. This brief is offered to apprise the court of the actual holding of Souders in order to avoid a ruling relying upon the holding of that case as petitioners have incorrectly stated it to be.

For the purpose of clarity and a full and fair resolution of the issue before the Court, and in the interest of justice and due process of law, respondent respectfully urges the Court to grant him leave to file the attached Supplemental Brief For Respondent and to consider the matters discussed therein as they may influence final resolution of the issues before the Court.

Respectfully submitted,

JOHN FRANKLIN PROSISE
By Counsel

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IN THE
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October Term, 1982

GILBERT A. HARING, et al., Petitioners;

v.

JOHN FRANKLIN PROSISE, Respondent.

On Writ Of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

SUPPLEMENTAL BRIEF FOR RESPONDENT

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STATEMENT

For a discussion of the Questions Presented, Opinions Below, Jurisdiction, Constitutional and Statutory Provisions Involved, Statement of Facts, and Argument on the merits of the case, respondent respectfully directs the Court to the Brief For Respondent. This Supplemental Brief For Respondent is filed pursuant to Rule 35.6 of the Rules of the Supreme Court to address arguments advanced and authorities relied upon by petitioners in the Reply Brief To The Brief For Respondent and in oral argument before the Court on April 20, 1983. Haring, et al. v. Prosise, 33 Cr.L.Rptr. 4032 (U.S., argued April 20, 1983)(No. 81-2169). Attached hereto as an Appendix are certified copies of the Docket Sheet, an eleven (11) page transcript and an Order in Souders v. Gabrielson, et al., At Law No. 15840 (Arlington County Circuit Court, July 18, 1974). As reflected on the Docket Sheet (Appendix at 1a-2a), other matters are contained in the record of that case which are not included with this brief inasmuch as they are voluminous and are not relevant to the precise nature of the holding in that case.

ARGUMENT

Virginia's general rule of preclusion is that:

> a judgment rendered in a criminal prosecution, whether of conviction or acquittal, does not establish in a subsequent civil action the truth of the facts on which it is rendered or constitute a bar to a subsequent civil action based upon the offense on which the party stands convicted or acquitted.

Aetna Casualty & Surety Co. v. Czonka, 200 Va. 385, 388, 105 S.E. 2d. 869, 872 (1958)(a person in privity with the civil defendant pleaded guilty to an offense having as an essential elcment a

dispositive issue in the civil suit). The Virginia Supreme Court recently has declined to abandon this general rule of preclusion both in cases of attempted "offensive" use of collateral estoppel, Norfolk & Western Ry. Co. v. Bailey, 221 Va. 638, 272 S.E. 2d 217 (1980), as well as in cases of attempted "defensive" use of collateral estoppel. Greene v. Warrenton Production Credit Assoc., 223 Va. 462, 291 S.E.2d 209 (1982). For a full discussion of the applicable Virginia law, respondent directs the Court to the Brief For Respondent at 14-17, and to the Brief Of Amicus Curiae University of Virginia Post-Conviction Assistance Project.

Unable to point to any case from the Virginia Supreme Court casting doubt on the continuing vitality of this general rule of preclusion, petitioners elevated the denial of a writ of error by the Virginia Supreme Court in Souders v. Gabrielson, et al., Record No. 741124 (Va.Sup.Ct. April 16, 1975), from a footnote in their opening brief (Brief For Petitioners at 20 n. 10) to "precedent" in the reply brief for the proposition that "Virginia law precludes a civil suit based on §1983 after it is demonstrated that the plaintiff had previously pleaded guilty to the crime that gave rise to the alleged violation of his civil rights" (Reply Brief To Brief For Respondent at 7)(hereinafter Reply Brief). Noting that Souders involved a §1983 claim unrelated to the exclusion of evidence on fourth amendment grounds, whereas the Prosise court expressly limited its holding to issues related to the admissibility of evidence on fourth amendment grounds, see Prosise v. Haring, 667 F.2d 1133, 1138 (4th Cir. 1981), respondent concluded that Souders is inapposite and concentrated his efforts to determining the precedential effect of the denial of

a writ of error by the Virginia Supreme Court.[1/] However, several members of the Court expressed an interest during oral argument in the precise holding of the Souders court. As a result, respondent has obtained and submits for the Court's consideration additional portions of the record of that case (see Appendix at 1a-15a).

As the attached records reveal, contrary to what petitioners have asserted, the Souders court did not preclude that action once it was "demonstrated that the plaintiff had previously pleaded guilty to the crime that gave rise to the alleged violation of his civil rights" (Reply Brief at 7). Instead, the court carefully considered numerous depositions and affidavits, and heard oral testimony and argument, before affirmatively concluding that the §1983 action was precluded by Mr. Souders' earlier guilty pleas to the offenses giving rise to his §1983 claims. This was made necessary, the court stated, "because, on the basis of the plea of res judicata and estoppel filed by the Defendant [sic] it was not, at once, obvious whether all of the issues which are presented in the [§1983] pleadings were, indeed, decided

---

1/ As counsel for respondent pointed out in oral argument, the Virginia Supreme Court has repeatedly stated that the denial of a writ of error by that court has no precedential effect upon the same issues in another case. See e.g., Town of South Hill v. Allen, 177 Va. 154, 12 S.E.2d 770 (1941) ("Whatever reasons impelled the court, as then constituted, to refuse the appeal, this case is not a controlling authority under the doctrine of stare decisis") (id., 12 S.E.2d at 775); Brunswick County v. Peebles & Purdy Co., 138 Va. 348, 122 S.E. 424 (1924) ("The effect of the refusal of the writ in the former case, however brought about, was to affirm the decision of the court below in that particular case, ... but the refusal of that writ did not decide the question involved in any other case") (id., 122 S.E. at 430). Cf. American Railway Express Co. v. Levee, 263 U.S. 19 (1923); Western Union Telegraph Co. v. Crovo, 220 U.S. 364 (1911) (the fact that the state Supreme Court denied a discretionary writ of error, stating that a review of the record below revealed no reversible error, "did not take from the refusal its ostensible character of declining jurisdiction" so that a petition for writ of certiorari seeking review by this Court will lie to the state trial court as "the highest Court of the State in which a decision could be had"). American Railway, supra, 263 U.S. at 20-1. Therefore, even were the Souders case on point, which it is not (see discussion infra at 4), it would have no controlling effect upon the issues raised in this case.

[by the guilty plea] in those lower Courts" (Appendix at 5a) (emphasis added).

In deciding that Mr. Souders' §1983 claims "were, indeed, decided" by his guilty pleas, the Court noted that Mr. Souders had not alleged that "any force was used on him, except that force used to subdue his resistance to arrest" (Appendix at 6a). Because Mr. Souders was privileged under Virginia law to resist an unlawful arrest, the court reasoned, his resistance was unlawful only if the arrest itself was lawful (Appendix at 7a). Consequently, the court concluded, Mr. Souders' plea of guilty to resisting arrest by assaulting the arresting officers necessarily decided the question whether the resistance was unlawful and the arrest was lawful (Appendix at 9a). Moreover, the court noted, Mr. Souders' guilty plea to drunk in public was an admission that his arrest for that offense was lawful. (Id.) For those reasons, and not simply because he had pleaded guilty, the court held that Mr. Souders was precluded by his guilty pleas from claiming in a subsequent §1983 action that his actions were lawful and the actions of his arresting officers in arresting and subduing him were unlawful. (Id.) Apparently recognizing the continuing vitality in Virginia of the traditional rule concerning the mutuality of judgments, the court then determined that Mr. Souders' §1983 claims fell within the exception to the mutuality rule first enunciated in Eagle, Star & British Dominions Insurance Co. v. Heller, 149 Va. 82, 140 S.E. 314 (1927), concluding that because Mr. Souders was injured while unlawfully resisting a lawful arrest, and not during an unlawful arrest or after he was reduced to police custody, he should not benefit from the injuries he caused by wrongfully resisting arrest (Appendix at 10a).

To find support for their position in Souders, petitioners

have misstated the holding of the court below in this case[2/] in order to construct an argument that it conflicts with a holding in Souders which that court did not make.[3/] Simply put, the Souders court did not hold as petitioners have stated that it did. Moreover, even if it had, it did not involve the precise issue decided by the court below in this case. Finally, even if it had involved the same issue, the denial of a writ of error by the Virginia Supreme Court has no stare decisis effect upon that issue in any other case. For these reasons, petitioners can find no support for their position in Souders.

On the contrary, Souders fully supports respondent's contention that collateral estoppel in Virginia extends only to issues: (1) which were actually litigated in the earlier action; (2) which were necessary to the judgment in that case; and (3) which satisfy the rule of mutuality or fall within the recognized exception to that rule (Brief for Respondent at 14-17). For that reason, because Mr. Prosise's fourth amendment claim was not litigated by his guilty plea, because resolution of that issue was not necessary to the guilty verdict, and because there is no mutuality of judgment or exception to that rule in his case, he is not precluded by conventional Virginia preclusion law, or by the decision in Souders, from litigating his claims in this action.

2/ Petitioners incorrectly stated that the Prosise court "held that, in Virginia, a flat rule of nonpreclusion always permits persons to sue police officers pursuant to 42 U.S.C. §1983, notwithstanding a claimant's guilty plea" (Reply Brief at 2)(emphasis added), despite the clear language of the court which expressly limited its holding to unlitigated issues related to the admissibility of evidence on fourth amendment grounds (Prosise, supra, at 1138), while assuming that a §1983 claimant normally would be precluded from relitigating elements of an offense to which he earlier had pleaded guilty (Id. at 1140).

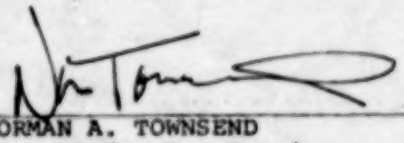
3/ As discussed above, infra at 2-3, petitioners argue that because of the "Souders precedent" (Reply Brief at 4,5,6), Virginia law now precludes all §1983 actions upon proof that the claimant earlier "pleaded guilty to the crime that gave rise to the alleged violation of his civil rights" (Reply Brief at 7), despite the fact that the Souders court ruled the claims precluded only after taking evidence and testimony on the question "whether all of the issues which are presented in the [§1983] pleadings were, indeed, decided in those lower Courts" (Appendix at 5a).

CONCLUSION

Contrary to petitioners' argument that the denial of a writ of error in Souders v. Gabrielson somehow changes the law of preclusion in Virginia, that law is well settled in a manner adverse to petitioners' position. Moreover, Souders is in conformity with, rather than contrary to, the settled law in Virginia. For that reason, the decision of the court below in this case is correct and should be affirmed.

Respectfully submitted,

JOHN FRANKLIN PROSISE
By Counsel



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Commonwealth of Virginia

In the CIRCUIT Court of the COUNTY OF ARLINGTON

GUTHRIE E. SOUDERS, Plaintiff

vs. { At Law No. 15840

EDWARD GABRIELSON, DANIEL HARTLE, STEWART PELL and HARRY PARR, Defendants

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I JOSEPH C. GWALTNEY, Clerk of the above mentioned Court, certify that the papers listed above and filed herein, are the original papers in the above styled case.

Teste: _____ Clerk

Commonwealth of Virginia

In the CIRCUIT Court of the COUNTY OF ARLINGTON

GUTHRIE E. SOUDERS, Plaintiff

vs. At Law No. 15840

EDWARD GABRIELSON, DANIEL HARTLE
STEWART PELL and HARRY PARR, Defendants

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A COPY.

TESTE: DAVID A. BELL, Clerk

By _____ Deputy Clerk

I JOSEPH C. GWALTNEY, Clerk of the above mentioned Court, certify that the papers listed above and filed herein, are the original papers in the above-styled case.

Teste: _____ Clerk

V I R G I N I A

ARLINGTON CIRCUIT COURT

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SUPREME COURT OF VIRGINIA
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- - - - - - - - - - - - - -X

GUTHRIE E. SOUDERS,

Plaintiff

vs.

EDWARD GABRIELSON,

and

DANIEL HARTLE,

and

STEWART PELL,

and

HARRY PARR,

Defendants

AT LAW NO. 15840

- - - - - - - - - - - - - -X

Arlington, Virginia
Monday, June 10, 1974

The above-entitled cause came on to be heard before the Honorable Charles S. Russell, Judge of the Circuit Court of Arlington County, in the courthouse, Arlington, Virginia, beginning at 12:17 o'clock, p.m.

AUDREY J. RUDIGER
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APPEARANCES:

For the Plaintiff:

RAYMOND D. CLARK, ESQUIRE

For the Defendants:

SIMMONDS, COLEBURN, TOWNER & CARMEN
BY: GEORGE C. TOWNER, JR., ESQUIRE

CHARLES G. FLINN, ESQUIRE

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EXTRACT OF PROCEEDINGS

THE COURT: Gentlemen, it has been necessary to go through this exercise, I am afraid, in order to determine whether or not the several guilty pleas and findings of guilty made by the County Court and, incidentally, the Juvenile and Domestic Relations Court, were such as to preclude the plaintiff in this case from relitigating the issues so determined in those Courts.

This has been made necessary because, on the basis of the plea of res judicata and estoppel filed by the Defendant it was not, at once, obvious whether all of the issues which are presented in the pleadings were, indeed, decided in those lower Courts.

And, even after deciding it, it is another question, and purely a question of law, as to whether the plaintiff in this case should be precluded simply on those issues and allowed to go to trial on the remaining issues, or whether he is totally barred from maintaining this action against

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these defendants in this case.

Obviously, if the police have every right in the world to arrest a citizen, and they do make a lawful arrest of him, they can not, then, after having handcuffed him, beat him over the head with a night stick, or shoot him, or whatnot, use force unnecessary to the arrest.

If they do that, they're just as liable to civil suit as anyone else.

I mention that, not because that was what was alleged to have occurred here, but that I had to hear evidence to decide that that is not what is alleged to have occurred.

It does not appear from the pleadings in this case or from the plaintiff's own testimony in this case, that he contends that any force was used on him, except that force used to subdue his resistance to arrest.

He does not say that after he was arrested, after he was handcuffed, after

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he was in control, that he was, then, assaulted by the Police.

He says, in his pleadings in this case and in his testimony here today, that he resisted their efforts to arrest him, and, that in his resistance, a struggle ensued, in which he was injured.

It is a rather unusual facet of the law that police officers are, indeed, permitted to use force such as is necessary to reduce a person to control when they go to arrest him.

The test is, is the arrest a lawful one.

If they attempt to arrest a citizen for a cause which is not probable cause, their arrest is an unlawful one, and the citizen has the right to resist them.

He does not have to retreat to the nearest wall, but he can put up such a resistance as one might against any agressor because, [he believes] the officer, then, is in no better position than any other private

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individual, to assault someone else, and the usual rule of self-defense applies.

But, if the arrest is a lawful one, if they have the right to arrest the citizen, then, he correspondingly has no right, whatever, to resist them.

Indeed, it's his duty to submit. If he resists them, then, his resistance is, itself, unlawful and, as a matter of fact, is a separate offense. He has violated the law, simply by resisting their effort to accomplish a lawful arrest of him.

If he is injured in the course of putting up such a resistance, he can not recover for it unless they used excessive force.

Now, the evidence here shows that the plaintiff does not even contend that they used excessive force.

He does not say that the force was more than that necessary to overcome his resistance.

The force was exactly what was

necessary in order to overcome his resistance.

They struck no blows in response to his blow, first struck at them. They produced no weapons, although they had them.

Instead, they tried to hold him and to wrestle his arms into a position where they could handcuff him, and, in the course of wrestling his arms into that position, they apparently broke his shoulder, which is regrettable.

But, they did not step outside of their authority in doing it. In my view, the arrest, which they sought to make, was a lawful one.

His resistance to it was unlawful, and the Court is precluded from relitigating those questions by virtue of his pleas of guilty in the County Court and the findings of the County Court.

Now, in these circumstances, the question still arises, should he be permitted to go to the jury in this case upon the issue of excessive force.

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Not withstanding the way I view this evidence, is the jury going to take another view if they wish.

Should we start by telling the jury that it is conceded here that they had the right to arrest him, and that he had no right to resist?

But, he did resist, and in the course of his resistance, they injured him. It is for the jury to determine whether they used more force than necessary.

Based upon The Eagle Insurance Company vs. Heller Case 149 Virginia 82, it appears to me the answer to that is no, because, in order to permit him to litigate that, would be to seek damages for, what in effect, was his own wrong.

His finding of guilty, particularly based upon his plea of guilty, precludes him from making, what amounts to, a collateral attack on that plea of guilty and to seek to recover damages from the consequences of that wrong, which he was found to have committed.

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And, to my mind, it would make a mockery of the Judicial system, if he were permitted, now, to recover some damages from these police officers whom he stands convicted of having assaulted, under the circumstances in which he has, also, been convicted of the offense for which they went to arrest him.

Again, I conclude that his arrest was a lawful one. In other words, I do not see under these pleadings, how he can go to the jury on any issue arising out of this case without making a collateral attack upon those convictions in the lower Court.

One can try to spin these lines extremely fine, but I think, in order to allow him to go to the jury in any guise in this case would spin them so fine as to make a mockery of justice.

And, so, although the question is admittedly a difficult one, and a close one, I think the plea of res judicata and estoppel must be sustained, and that the effect of sustaining them, must be to bar

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him entirely in this case, and not just to preclude him on these particular issues.

An order will be entered accordingly, and the exceptions of the plaintiff will be noted.

AUDREY J. RUDIGER
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CERTIFICATE OF REPORTER

I, Latisha S. Lloyd, do hereby certify that I took the stenographic notes of the foregoing proceedings and reduced the same to typewriting; that the foregoing is a true record of the aforesaid proceedings; that I am neither related to, nor employed by any attorney or counsel employed by the parties hereto; nor financially interested in the action.

Latisha S. Lloyd (Lou Wright)
Court Reporter

A COPY,
TESTE: DAVID A. BELL, Clerk
By Barbara Wilson
Deputy Clerk

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591-3648

VIRGINIA:

IN THE CIRCUIT COURT OF ARLINGTON COUNTY

GUTHRIE E. SOUDERS,	:	
Plaintiff,	:	At Law No. 15840
vs.	:	
		ORDER
EDWARD GABRIELSON, et al,	:	
Defendants.	:	

This cause came on to be heard on the 10th day of June, 1974, on the Plea of Estoppel and Res Adjudicata filed by the defendants, Edward Gabrielson, Daniel Hartle, Stewart Pell and Harry Parr; and

The Court having considered the legal authorities presented by counsel, having taken testimony with relation to said Plea, having heard the argument of counsel and being of the opinion that said Plea should be sustained,

It is accordingly ORDERED and ADJUDGED that the Plea of Estoppel and Res Adjudicata filed by the defendants, Edward Gabrielson, Daniel Hartle, Stewart Pell, and Harry Parr, be and the same hereby is sustained.

It is further ORDERED that this action be and the same hereby is dismissed with prejudice, to which ruling of the Court the plaintiff, by counsel, duly excepted.

THIS ORDER IS FINAL.

ENTERED: July 18th, 1974

Clark L. Randt
Judge

SEEN:

SIMMONDS, COLEBURN, TOWNER & CARMAN

By George C. Towner, Jr.
George C. Towner, Jr.
Counsel for Defendants

Charles G. Flinn
Charles G. Flinn
Counsel for Defendants

SEEN AND OBJECTED TO:

Raymond D. Clark
Raymond D. Clark
Counsel for Plaintiff

A COPY,

TESTE: DAVID A. PELZ, Clerk

By Mary A. Taylor
Deputy Clerk